IN THE
Supreme Court of the United States

OCTOBER TERM, 1921

No. 233

NORTH CAROLINA RAILROAD COMPANY,
PETITIONER,

vs.

EVELYN K. LEE, ADMINISTRATRIX, RESPONDENT

Brief for Respondent

JOHN A. BARRINGER,
R. C. STRUDWICK,
Counsel for Respondent.

HAYWORTH PUBLISHING HOUSE, WASHINGTON, D. C.

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STATEMENT OF THE CASE

This action was begun May 26, 1919, by Evelyn K. Lee, widow and administratrix of Hugh Scott Lee, against the North Carolina Railroad Company, in the Superior Court of Guilford County, in that State, to recover damages for the alleged negligent killing of her husband on March 15, 1919, by defendant.

The North Carolina Railroad Company is a corporation chartered in 1849 by the Legislature of that State, and its roadbed and track lie wholly within its limits. On September 11, 1871, the Rich-

mond & Danville Railroad Company, a Virginia corporation, came into the possession and control of the track, roadbed, engines, locomotives, coaches, etc., belonging to the said North Carolina Railroad Company, and to the rights, franchises and other property of said company, under a lease for the term of thirty years then made between said corporations. *State vs. Railroad,* 73 N. C., 527 (528). In said lease it was covenanted that the lessor would not interfere with the use and operation of said railroad properties by the lessee. *Hill vs. Railroad,* 143 N. C., 539 (570).

In the year 1895 the North Carolina Railroad Company executed to the Southern Railway Co., a Virginia corporation, successor in interest of its former lessee, a lease containing provisions similar to those in the first lease for a term of ninety-nine years. Since 1871 the North Carolina Railroad Company has maintained a corporate existence; but its only function has been to receive and disburse as dividends to its stockholders the money paid to it as rental by its lessees. It has not been a common carrier, as this term is ordinarily understood, since 1871, nor has it since that date exercised any of the functions of a common carrier or been engaged in that business. It may safely be said that all the engines, cars, coaches and other equipment which, in 1871, were delivered to its lessee, and even the rails and crossties then upon its roadbed, have long since been worn out and consigned to the scrap heap. It was not as a matter of fact on December 26, 1917, when the President,

pursuant to the Act of Congress, took possession and assumed control of said railroads, a system of transportation or carrier; it had then no physical properties or equipment and had not had for many years, the ownership, possession and control of which was necessary to constitute it such a system or carrier within the language and intent of the Act of Congress of August 29, 1916, or of the said proclamation, or of any other Act of Congress or proclamation relating to this matter.

It is for this reason no doubt that possession of it was never taken and control of it was never assumed by the Director General of Railroads. Its name is not included in the list of 165 carriers or systems of transportation which were taken over by him and which is referred to by this Court in the case of *Missouri Pacific Railroad Co. vs. Ault,* 256 U. S., —— (U. S. R. R. Admr. Bulletin, No. 4, pp. 198-200-221). These facts are distinctly stated by the petitioner in its brief filed in support of its petition for certiorari as follows: "There is no relationship of any kind whatsoever between the petitioner and the Director General of Railroads. Your petitioner is not named as one of the roads taken over for government operation during the war period. So far as these parties are concerned it is not known to the Federal government. *None of its properties were taken from it* because its properties at the time were in possession and control of its lessee, the Southern Railway Company" (page 35). There would seem, therefore, to be no room for contention either as to the accu-

racy or the pertinency of the facts establishing the status of the North Carolina Railroad at the times just mentioned.

Brief of the Argument

The record in this case shows that Respondent (hereinafter called plaintiff), a citizen and resident of North Carolina, sued the Petitioner (hereinafter called defendant), a corporation chartered by that State, upon a cause of action arising there. The cause proceeded regularly to trial, first in the Superior Court and then in the Supreme Court, and resulted in a verdict and judgment for five thousand dollars in favor of the plaintiff. The defendant in this proceeding asks this Court to review the action of the State Court and to reverse this judgment because, as it contends, the said judgment is erroneous and because it wrongfully deprives defendant of a right, privilege and immunity conferred upon it by the Federal Control Act of March 21, 1918. It is submitted that it is incumbent upon the defendant to maintain both branches of this contention in order to entitle it to a reversal in this Court of the judgment of which it complains. Even if the State Court had rendered a judgment against it which this Court might consider erroneous it could not upon that ground alone successfully invoke the jurisdiction of this Court to correct that error, nothing else appearing. The pertinent inquiry here would seem to be, not whether the judgment complained of was erroneous, but whether or not this record shows that

the defendant has thereby been wrongfully deprived of some right, privilege, or immunity to which it is entitled under the Act of Congress invoked by it, and which was seasonably and properly set up and claimed by it in the State Court.

Judicial Code, Section 237.

We respectfully contend that the record shows no such error.

The Point Presented for Decision by the Record in This Case

It is alleged in the complaint (Record, page 2) that the death of plaintiff's intestate was caused * * * by the negligence of the lessee of the defendant (the Southern Railway Co.). The answer to this allegation is a general denial (Record, page 3).

The only reference to the Director General of Railroads in the pleadings is the following (Record, page 3): "That the said railway (Southern Railway Co.) was being operated, maintained and controlled at the time mentioned by Walker D. Hines, Director General of Railroads, by virtue of the Acts of Congress of the United States and the orders of the President of the United States." This is in answer to the allegation in paragraph two of the Complaint (Record, page 1), that at the time of the death of plaintiff's intestate the Southern Railway Co. was operating the roadbed upon which it occurred, that is to say, the roadbed, the title to which, subject to a ninety-nine year lease, was in the North Carolina Railroad Co. Upon an

issue submitted to the jury they found that plaintiff's intestate was killed by the negligence of the defendant and assessed damages in the sum of five thousand dollars. There was judgment accordingly, and defendant appealed to the Supreme Court of the State, which affirmed the judgment *per curiam,* and without any written opinion.

During the trial in the Superior Court the defendant reserved the following exceptions:

(1) To the refusal of the Court to give the following instruction requested by it:

> "The evidence in this case showing that at the time of the injury to plaintiff's intestate which resulted in his death, the railroad properties, including the Pomona yards and the equipment thereon, were not being operated by the defendant or its lessee, the Southern Railway Co., but by the United States Railroad Administration, and that the plaintiff's intestate was an employee of the said United States Railroad Administration, and it being admitted that the Director General of Railroads has not been made and was not a party defendant in this action the jury should answer the first issue No." That issue was as follows:
>
> "1st. Was the plaintiff's intestate killed by the negligence of the defendant, as alleged in the complaint?"

(2) To the giving by the Court of the following instruction (Record, page 6):

> "This action is brought by the plaintiff, gentlemen of the jury, against the North

Carolina Railroad Company, and it is admitted, gentlemen of the jury, that the North Carolina Railroad Company is a corporation and that prior to the time of this grievance had been leased by the defendant company to the Southern Railway Company and the defendant alleges, gentlemen of the jury, and contends that you should find from this evidence that prior to the time of this injury the United States Government had taken over this road and was at the time of the accident operating it as a war measure. The law says, gentlemen, that a railroad company, such as the North Carolina Railroad Company is, can not lease its road and relieve itself of responsibility, but that it is responsible for the conduct of its lessee, in this case the Southern Railway Company. And the law says, gentlemen of the jury, that if you should find the United States Government was operating this road at the time of this occurrence that it was operating it in the capacity of a lessee, and that the original company, the North Carolina Railroad Company, would still be responsible for the acts and conduct of the government at the time it was operating it."

(3) To the signing of the judgment. It will be observed that there was presented to the Supreme Court of North Carolina only one assignment of error, the first (Record, pp. 6 and 7).

The second so-called assignment of error does not embody or announce any principle of law (Record, pp. 6 and 7).

The third assignment of error is merely formal

(Record, page 7). The second exception as taken is not assigned as error (Record, page 6), and was therefore abandoned in the Supreme Court of North Carolina. This is settled practice in that Court.

Carter vs. Reeves. 167 N. C., 132.

It seems also to be settled that where it is claimed, as here, that some right, privilege or immunity conferred upon defendant by an act of Congress has been infringed by a proceeding in a State Court, such right, privilege or immunity must have been seasonably and properly set up or claimed in the State Court.

Chicago & Northwestern Co. vs. Chicago, 164 U. S., 454.
Bolin vs. Nebraska, 176 U. S., 91.
Erie R. R. Co. vs. Purdy, 184 U. S., 148.

It is submitted that this means that such right, privilege or immunity must have been claimed and set up in accordance with the orderly and settled practice in the State Court.

By the application of this rule to the second exception (Record, page 6), which was not assigned as error in the State Court, and to the second alleged assignment of error (Record, page 7), which does not declare any legal principle, both would seem to be eliminated from consideration here. There is left then only the first exception and the first assignment of error which have been hereinbefore set out.

Did the Refusal of the State Court to Give This Instruction Constitute Error, and Such Error as Deprived Defendant of Some Right, Privilege or Immunity Conferred Upon It by the Federal Control Act.

(*a*) We submit that there was no error in the refusal to give said instruction. The *railroad properties* therein referred to were not the properties of the defendant. They were the properties not of the defendant, but of the Southern Railway Co. If this request contained an assumption or assertion that such properties belonged to defendant then such assumption or assertion was notoriously contrary to the facts, contrary to the facts admitted in this court in defendant's brief, heretofore cited, and this would have justified the action of the Court in refusing to give it. The only meaning consistent with the well-known and admitted facts which could have been put upon the words *railroad properties* was railroad properties of the Southern Railway Co. So reading these words there would seem to be no error in refusing to give the instruction and certainly no error of which the defendant can here complain, as such refusal affected only the status and the liability of the North Carolina Railroad Co., which was not and never has been under Federal control and not that of the Southern Railway Co.

It has been held for many years in North Carolina that the North Carolina Railroad Company is liable in such an action as this for damages arising from the negligence of the Southern Railway Co.,

its lessee, and this although the management, operation and control of the North Carolina Railroad was at the time of the tort complained of, exclusively vested in the Southern Railway Co., its lessee.

> *Logan vs. N. C. R. R.*, 116 N. C., 940 (decided in 1895).

This decision proceeds upon general principles of law. It has been acquiesced in for many years and has been reaffirmed in many subsequent cases and has never been thought to involve any Federal question.

The Court, in the ruling complained of, in effect refused to hold that this rule of law was changed by reason of the fact that the Southern Railway Co. system was under Federal control at the time this cause of action arose.

This ruling would seem no more to involve a Federal question than did the decision in the Logan case. Certainly there would not seem to be involved in said ruling any Federal question arising under the Federal Control Act, which is here invoked by the defendant, for the reason that it affected only the liability of the defendant which was not a carrier or system of transportation within the provisions of said act and never has been under Federal control.

It will be observed that the correctness and validity of the principles of law under which this defendant in the Logan case and the long line of cases

following it, was held liable is not drawn in question upon this record.

The defendant in its brief contents itself with citing and relying upon the Ault case as decisive of the instant case upon this point. The facts in the Ault case which this Court held exempted the Missouri Pacific Railroad Co. from liability to suit in the Arkansas court, upon the ordinary principles of common law, are materially different from the facts disclosed by this record upon which defendant relies to exempt it from a similar liability in the courts of North Carolina, and the principles of law applicable to that case do not, as we contend, apply to or control the instant case.

The Court held in that case that the Missouri Pacific Railway Co. was not answerable to the plaintiff in the State Court if the ordinary principles of common law liability were to be applied. The reason assigned was that said railroad company was a system of transportation within the meaning of the Federal Control act and as such had been taken over, pursuant to that act and the proclamation of the President, by the Director General of Railroads, and had been completely separated from the control and management of its system, that is, the physical properties of which it had been in possession and control up to the time of said enactment and which constituted it a system of transportation within the meaning of the act.

The Court says: "It is obvious that no liability arising out of the operation of these systems was

imposed by the common law upon the owner companies as their interest in and control over the systems was completely suspended," that is to say, suspended by the Federal Control act.

It can not justly be claimed, we think, that defendant here occupies a position at all analagous to that of the Missouri Pacific Railroad. None of the considerations which moved this Court to hold that company exempt upon common law principles when sued in the State Court are presented in this case. The North Carolina Railroad Company was not at the time Federal control went into effect a carrier or system of transportation within the language and intent of the Act of Congress and as defined by this Court in the Ault case. It was not by said act separated from the control and management of its system, that is, its physical properties and equipment, because, as has been shown, it then had no such properties and had not had for many years. The Director General of Railroads never took posession or assumed control of it. As defendant says in its brief: "There is no relationship of any kind whatsoever between your petitioner and the Director General. * * * None of its properties were taken from it because its properties at the time were in the possession and control of its lessee (Brief, page 35).

We therefore submit that the Ault case is not an authority for the position that the North Carolina Railroad Co. was not suable in the State Courts upon the ordinary principles of common law liability as that court might expound and apply those

principles just as in the case of any other resident and citizen of that State of which its courts had jurisdiction. These principles as declared and applied by that Court ever since 1895, when *Logan vs. N. C. Railroad Co.* was decided, fixed the defendant with liability in this case and necessarily resulted in the judgment against it. Plaintiff here does not base its right to sue the defendant in the State Court, upon any construction of the Federal Control Act, as plaintiff in the Ault case did, but upon ordinary principles of common law as declared and expounded by the Supreme Court of North Carolina; and it is submitted there is nothing in the Ault case which exempts a defendant situated as this defendant was from liability to such a suit, and further, that this Court will not interfere with the judgment thus obtained unless it operates to deprive the defendant of some right, privilege or immunity conferred upon it by the Act of Congress which it had invoked.

(*b*) *Did the Ruling Complained of as Erroneous Deprive the Defendant of any Right, Privilege or Immunity Conferred upon it by the Federal Control Act?*

This statute is construed in the Ault case and as there construed, the defendant would not seem to be within its provisions, and consequently it would seem that said act conferred upon defendant no right, privilege or immunity.

If the act did not embrace or include defendant within its provisions, no construction of said act

could reasonably be said to have deprived it of any right, privilege or immunity. It could not be deprived of what it never possessed.

In the opinion of this Court above referred to, it is said: " Here the term *carriers* was used as it is understood in common speech, meaning the transportation systems as distinguished from the *corporations* owning or operating them. Congress had, in section one, declared that such was its meaning. The President took over the physical properties, the transportation systems, and placed them under a single directing head, but he took them over as entities and they were always dealt with as such." Again: "It is this conception of a transportation system as an entity which dominates section ten of the act. The systems are regarded much as ships are regarded in admiralty."

While the defendant is a railroad corporation, an artificial being existing by virtue of the Act of the Legislature of North Carolina, and while it maintains, for some purposes, a corporate organization, as has been stated, it will be seen that in the opinion just cited a distinction is drawn between the *corporation* as such and the *carrier* or *system of transportation* mentioned in the Act of Congress. It has been shown also that at the time of the enactment of this statute no physical properties or equipment of the defendant were taken over by the Director General of Railroads, indeed, it had no such property and had not had since 1871. It was not, therefore, a system or transportation or carrier within the language or intent of the Act

of Congress and proclamation of the President pursuant thereto. It was never as a matter of fact, taken over by the Director General, as has been stated.

We respectfully contend, therefore, that it appears that the defendant is not included or embraced within the language or intent of the Act of Congress which it invokes and that, as that act conferred no right, privilege or immunity upon it, defendant can not claim that any construction of that act deprived it of any such right, privilege or immunity, and can not consequently claim here that the Supreme Court of North Carolina erred in refusing to hold it immune from suit in the State Court by reason of the provisions of the said Act of Congress.

Conclusion

Counsel for defendant in their brief (page 34) call attention of the Court to what they are pleased to say is the anomalous position of plaintiff, if this judgment should be affirmed. They there say: "He (she) would have, to all intents and purposes, a judgment against the North Carolina Railroad Co. which he (she) would be powerless to enforce by reason of the provisions of the Transportation Act."

If any anomaly exists it is submitted that it is found in such a statement as this. If this plaintiff is fortunate enough to have this judgment affirmed by this Court she believes it will be paid; she believes that the respect which is due and which

is universally conceded to the judgments of this Court will secure its payment. Since counsel has seen fit to make such a statement as this, at such a time and place, in regard to the satisfaction of a judgment which this court may see fit to affirm, it may be said that it is a well-known fact that this defendant has in Alamance County, North Carolina, real property which was never included in the lease either to the Richmond & Danville Railroad Company or to the Southern Raiway Co. valued at many times the amount of this judgment, and which is liable to its satisfaction if after affirmance by this Court, its payment elsewhere should be refused. It is respectfully submitted that the judgment of the Supreme Court of North Carolina should be affirmed.

JOHN A. BARRINGER,
R. C. STRUDWICK,
Counsel for Evelyn K. Lee, Admx.,
Respondent.

Greensboro, N. C., Feb. 21, 1922.

No. 7[redacted]2[redacted]38

Supreme Court of United States

NORTH CAROLINA RAILROAD COMPANY

PETITIONER

vs.

EVELYN K. LEE, ADMINISTRATRIX, RESPONDENT

Brief in behalf of Respondent.

J. A. BARRINGER,
R. C. STRUDWICK.

Counsel for Respondent.

HARRISON PRINTING CO., GREENSBORO, N. C.

BRIEF

In Behalf of Respondent

The line of railway upon which intestate was killed was a art of the North Carolina Railroad, which was in 1895, leased the Southern Railway Company for 99 years, and has nce then been operated by it. By a long line of decisions eginning with Logan vs. R. R. 116 N. C., 940 (1895) it has een settled in North Carolina, that the lessor road (the pe- tioner) is liable in damages for injuries arising from the egligence of its lessee.

The Complaint in this action was in the usual form asking amages against the petitioner for the negligent killing of her usband, a conductor, by the Southern Railway Company. he answer denied the acts of negligence charged, admitted the wnership of the Road by petitioner, and its lease to the South- rn, and alleged "that said railway was being operated and aintained and controlled at the time mentioned (March, 1919) y the Government of the United States through Walker D. ines, Director General of Railroads by virtue of the Acts of ongress of the United States and the orders of the President the United States."

The prayer of the answer was as follows: "Wherefore he defendant North Carolina Railroad Company prays that id action be dismissed."

There is no reference in the answer to any claim of pri- ilege, right or immunity of or by [redacted] under the Federal onstitution or any Act of Congress unless the quotation om the answer **Supra**, can be construed to be such.

Petitioner

That it cannot be so construed seems to be held in the fol- wing cases:

F. G. Oxley Co., vs. Butler, 166 U. S., 646. Dewey vs. esIloines 173 U. S., 193. Capital City Dairy Co., vs. Ohio, 33, U. S., 238. Bolin vs. Nebraska, 176, U. S., 83. Nor any such claim made in the instructions requested by peti- oner on the trial.

See Petition for Certiorari p. 4.

There is only an incidental reference to any Constitutional ght of petitioner in its brief filed in the Supreme Court,

to-wit: "To take its property in payment of this judgment would be to take its property without due process of law."

This is not claiming a right under the Constitution of the United States. That Constitution is not mentioned. Such language is insufficient to raise any Federal question.

The Constitution of North Carolina Article 1. 17 forbids such an Act, and for aught that appears the claim was under that Constitution. Kipley vs. Illinois, 170, U. S., 182.

The only objection made before the trial Court, relating to this matter, was, as has been stated to the non-joinder of the Director General as a party defendant; that is, to a defect of parties. This is an implied admission that the action was well brought if the Director General had been made a Co-defendant. This is not a claim of immunty right or privilege by petitioner," it seems rather an implied admission of a joint liability. The Director General never applied to be made a party. There was a verdict and judgment in favor of respondent for $5000. Upon appeal to the State Supreme this judgment was affirmed by a **per Curiam** order; and in so donig it does not appear that Court did anything more than to decline to pass upon the objection made in the trial Court, because it was not raised in the manner required by the State practice. This requires that such an objection, a defect of parties, shall be raised by demurrer and not by answer as the petitioner attempted to do, when it appears, as here, upon the face of the record. The State Statute is mandatory upon this point. Rev: 1905 474(4). C. S. 511 (4). It further provides that unless raised by demurrer, such an objection is waived Rev. 1905 478. C. S. 518.

In Rosenbecker vs. Martin 170 N. C., 237 (1915) the Court says "The defect of parties, if there was one, appeared upon the face of the record and objection should have been taken by demurrer in the beginning. Revisal 474 (4).Davidson vs. Elms, 67, N. C., 228.

Machine Co., vs. Liumber Co. 109, N. C., 576. A defendant cannot demur and answer at the same time. By answering to the merits all defects are waived, except an objection to the jurisdiction of the Court or to the defectiveness of the Cause of Action." This objection not having been raised in the trial Court in the manner required by Statute and the decisions of the Court, that Court upon this ground, if no other was correct in affirming the judgment, regardless of what its decision might have been, or ought to have been if the

points had been raised and presented according to law, in the trial Court.

This point was presented and insisted upon by respondent on the appeal. This appears from the excerpt from her brief attached hereto as "Exhibit A."

It is settled practice in North Carolina that only those points properly raised and presented to the trial Court will be considered on appeal. Sutton vs. Walters, 118, N. C., 495, (502). Meekins vs. Tatum, 79, N. C., 546.

Even, therefore, if it be held that this record discloses any claim of a Federal right ,privilege or immunity, still it further appears therefrom that such right, privilege or immunity was never properly and in accordance with the State practice, presentedin either in the trial Court or to the Supreme Court, and that the judgment of Supreme Court did not necessarily involve a decision of such right, privilege or immunity. It cannot therefore be contended, that the judgment of the Supreme Court denied to petitioner any such right, privilege or immunity, so as to confer jurisdiction upon this Court, to review its judgment by Certiorari.

The right, privilege or immunity claimed, arises, if at all, under the third section of the Act of Congress. R. S., U. S., 709, Judicial Code 237.

This seems to be the contention of petitioner as to the Federal question attempted to be presented. (Petitioners brief, p 14). Whether a right or privilege claimed under the Constitution or an Act of Congress was distinctly and sufficiently pleaded and brought to the notice of the State Court is itself a Federal question, upon which this Court can and will pass. This Court has held that where the case arises under the third clause of the jurisdictional Statute, the right title immunity or privilege must be specially set up or claimed. Chicago & N.W., Co., vs. Chicago, 164 U.S. 454. Schuyler Nat'l Bank vs. Bullong 150 U. S., 85. Bolin vs .Nebraska 176, U. S., 83especially at p. 91. Telluride Power Co., vs. Rio Grande Co., 175 U. S., 639, at p. 647.

This Court in Erie R. R. vs. Purdy 184, U. S., 148 held that where a party asserting that the final judgment of the highest Court of a State denied to him a right or immunity under the Constitution of the U. S., did not raise such questions or specially set up or claim such rights or immunity in the trial Court, thisCourt cannot review such final judgment and hold that the right or immunity so claimed had been denied by the highest Court of the State, if that Court did nothing

more than decline to pass upon the Federal question because not raised in the trial Court as required by State practice."

The right, privilege or immunity claimed must be set up or claimed in the trial Court whenever, under the State practice the highest Court of the State, in reviewing the judgment of the trial Court refuses to consider questions not therein raised. Baldwin vs. Kansas 129, U. S., 152. Spies vs. Illinois, 123 U. S., 131. Hulbert vs. Chicago, 202, U. S., 281.

The per curiam order of the Supreme Court affirming the judgment of the trial Court, is entirely consistent with the idea that the objection of the non-joinder of the Director General was not properly made in the trial Court, and that under the State practice this objection was not presented in the record before it.

Brown vs Massachusetts 144, U. S., 573.

We therefore contend:

(1) That the objections raised in the trial Court did not constitute a claim of Federal right, privilege or immunity of the petitioner or by the petitioner.

(2) That if they did, such claim was never, and in accordance with State practice presented to the trial Court.

(3) That no such claim was presented in petitioner's brief in the Supreme Court of North Carolina.

(4) That the per curiam order of the Supreme Court of North Carolina, affirming the judgment did not necessarily or at all involve a denial of such claim. right privilege or immunity. It is respectfully submitted that the petition for a writ of cerliorari should be denied.

JOHN A. BARRINGER
R. C. STRUDWICK
Counsel for Respondent.

March 5, 1921.

EXHIBIT A.

No. 389 TWELFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

EVELYN LEE vs. N. C. R. R. CO.

PLAINTIFF'S BRIEF

The only exception urged in behalf of appellant is that the Director General of Railroads was not made a party.

This objection, if it had any validity, can not be raised in the manner attempted here. Revisal 474 (4) 478.

If there was a defect of parties the defendant waived it by failure to demur; and it could raise this objection in no other way.

No. [redacted]2[redacted]33

Supreme Court of the United States

OCTOBER TERM, 1920

NORTH CAROLINA RAILROAD COMPANY,
PETITIONER,

vs.

EVELYN K. LEE, ADMINISTRATRIX, RESPONDENT.

Reply Brief of Petitioner to Brief of Respondent.

S. R. PRINCE,
H. O'B. COOPER,
JOHN W. WILSON,
Counsel for Petitioner.

L. E. JEFFRIES,
Of Counsel.

HAYWORTH PUBLISHING HOUSE, WASHINGTON, D. C.

No. 758.

Supreme Court of the United States

OCTOBER TERM, 1920

NORTH CAROLINA RAILROAD COMPANY,
PETITIONER,

vs.

EVELYN K. LEE, ADMINISTRATRIX, RESPONDENT.

Reply Brief of Petitioner to Brief of Respondent.

The brief filed in this cause on behalf of respondent advances two reasons why the petition for the writ of certiorari should not be granted.

First: That the only objection made by the petitioner before the trial court that judgment should not be rendered against it was that there had been a non-joinder of parties, as to which no proper objection had been filed in that court; and

Second: That the record does not disclose any claim by the Petitioner of a Federal right, privilege or immunity.

No Claim of Non-joinder of Parties.

An examination of the printed record filed in this cause will clearly refute the claim of respondent that the only exception made by petitioner in the trial court was that the Director General had not been made a co-defendant. There was in effect really only one exception taken, and that was that the property of the Petitioner having been taken from it against its will and being operated and controlled at the time the cause of action arose under and by virtue of the act of Congress and the order of the President of the United States, there could be no recovery against it.

The first exception was for the refusal of the court to give an instruction that:

> "The evidence in this cause showing that at the time of the injury to plaintiff's intestate, which resulted in his death, the railroad properties, including the Pomona yards and the equipment thereon, were not being operated by the defendant or its lessee, the Southern Railway Company, but by the United States Railroad Administration, and that the plaintiff's intestate was an employee of said United States Railroad Administration, and it being admitted that the Director General of Railroads has not been made and is not a party defendant in this action—"

the jury should find for the petitioner. (Printed record, page 9.)

The second exception was to the action of the trial court in giving, instead of the charge requested in Exception No. 1, an instruction in part as follows:

> "The law says, gentlemen of the jury, that if you should find the United States Government was operating this road at the time of this occurrence that it was operating it in the capacity of a lessee; and that the original company, the North Carolina Railroad Company, would still be responsible for the acts and conduct of the government at the time it was operating it." (Printed record, page 10.)

The third exception was to the signing of the judgment in the cause. (Printed record, page 10.)

There were no other exceptions taken and there was consequently nothing further before the Supreme Court of North Carolina than that which is involved in these exceptions. There is not one word in the record before this court to sustain the statement made by counsel for respondent in their brief (page 2) that:

> "The only objection made before the trial court, relating to this matter, was, as has been stated, to the non-joinder of the Director General as a party defendant; that is, to a defect of parties."

So that the first point which is argued to some extent in the brief of respondent is entirely beside

the record, and it is deemed unnecessary to make any further reply to the same other than as above set out.

Right Under Act of Congress Specifically Set Up in Record.

The second and other argument contained in respondent's brief is that the petitioner did not claim any Federal right, privilege or immunity in that such was not presented or set up in the trial court or the Supreme Court of North Carolina.

In its answer filed in the trial court petitioner, after denying all allegations in the complaint other than the fact that it was a corporation in the State of North Carolina, owning the railroad where the accident occurred, which had been leased by it to the Southern Railway Company, distinctly averred:

> "* * * The facts being that said railway was being operated, maintained and controlled at the time mentioned by the Government of the United States by and through Walker D. Hines, Director General of Railroads, by virtue of the acts of Congress of the United States and the orders of the President of the United States." (Printed record, page 6.)

Here is a distinct and clear allegation that the Petitioner's properties were in the hands of the United States Government under an Act of

Congress and an order of the President of the United States. There can be do doubt whatever that this allegation put the court on notice that by reason of the said act and said proclamation the petitioner claimed it was not liable for the cause of action sued upon. It is true that the act was not specifically named, but it is equally true that the courts are charged with judicial notice of such acts and such proclamations, and there was but one Act of Congress and one proclamation dealing with the subject.

Armstrong vs. U. S., 80 U. S., 154.
Jenkins vs. Collard, 145 U. S., 546.
Caha vs. U. S., 152 U. S., 211.
Spokane, etc., R. Co., vs. Tieler, 167 U. S., 65.
Cosmos Company vs. Gray Eagle Company, 190 U. S., 301.
Brown vs. Colo., 106 U. S., 96.
15 Ruling Case Law, 1064.

Notwithstanding the distinct allegation that the petitioner's properties were in the hands of the Government under the act of Congress and the order of the President of the United States, and the prayer of the petitioner that by reason thereof the action should be dismissed (printed record, page 6), the trial court entered judgment against it, which is the basis of exception number three. (Printed record, page 10.)

Although the judgment of the lower court was affirmed by the Supreme Court of North Carolina *per curiam*, there can be no speculation as to what

was involved in that decision. As stated, *supra,* the exceptions filed in the cause, which were before the Supreme Court of North Carolina, in effect related to but a single question: viz., is the petitioner, the corporate owner of a railroad system, liable in damages on a claim arising out of the operation of said railroad by the United States Government under and by virtue of an act by Congress and an order of the President of the United States made pursuant thereto?

Although the Supreme Court of North Carolina handed down no written opinion and gave no reasons for its action, yet its affirmance of the lower court's judgment necessarily involved a right or immunity claimed by your petitioner under the act of Congress, because that was the sole question before the court.

As was said by this court, in the early case of *Parmelee vs. Lawrence,* 11 Wall., 38:

> "It must appear in the pleadings of the suit, or from the evidence in the course of the trial, in the instructions asked for, or from exceptions taken to the rulings of the court. It must be that such a question was necessarily involved in the decision, and that the State court would not have given a judgment without deciding it."

In our case the question appears in the answer filed, and under the exceptions taken the State court necessarily decided the question raised thereby.

Also in *Haire vs. Rice,* 204 U. S., 291, 299:

> "The decision of both questions, as the court determined them, was essential to the judgment rendered, and the decision of the second was a distinct denial of the Federal right claimed by the plaintiff in error. Where it clearly and unmistakably appears from the opinion of the State court under review that a Federal issue was assumed by the highest court of the State to be in issue, was actually decided against the Federal claim, and the decision of the question was essential to the judgment rendered, it is sufficient to give this court authority to re-examine that question on writ of error. *San Jose Land & Water Company vs. San Jose Ranch Company,* 189 U. S., 177. Applying this rule to the case, there is jurisdiction to re-examine the claim of the plaintiff in error on its merits."

In this case as in that the decision of a Federal question was essential to the judgment rendered and is sufficient to give this court jurisdiction.

The respondent sets up as an exhibit to her brief in this court a quotation from her brief in the Supreme Court of North Carolina. While recognizing that the briefs filed in the State Supreme Court are no part of the record here, we feel justified in denying the assertion that the only exception that was urged there was a non-joinder of the Director General as a party, by quoting from petitioner's brief in that court, where it was said:

> "The properties of the Railroad Com-

pany, without its consent, had been taken over by the Government of the United States and were being operated and controlled by Government agencies, the North Carolina Railroad having no contractual relations with these agencies. To take its property in payment of this judgment would be to take its property without due process of law. Only such judgments as are rendered in accordance with the Act of Congress passed March 21, 1918, could be collected out of funds provided by Congress to pay such judgments."

It is respectfully submitted that the writ of certiorari should be granted.

S. R. PRINCE,
H. O'B. COOPER,
JOHN N. WILSON,
Counsel for Petitioner.

L. E. JEFFRIES,
Of Counsel.